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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 924

LOREN R. GAJEWSKI and MERVIN A. GAJEWSKI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LOREN R. GAJEWSKI AND
MERVIN A. GAJEWSKI
Alexander, North Dakota
Petitioners pro se

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JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1966 (App. A, infra). A timely Petition for Rehearing was denied on December 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Does a proceeding under 28 U.S.C.A. 2201 for the purpose of declaring civil rights and citizenship in dispute because of the continuing effect of a criminal judgment alleged to be void because of the denial of fundamental constitutional rights during the procurement thereof, fall under the jurisdiction of Rule 60(b) F.R.C.P. providing for an independent action for relief from judgment?

2. Could the circuit court for the first time on appeal reach the merits of the case which was dismissed on jurisdictional grounds, by considering the complaint for declaratory judgment as a motion for writ of error coram nobis and denying a hearing on the issues on the ground that the errors relied upon were not so fundamental as to warrant relief from judgment?

3. Would the allegations in the complaint, taken as true, warrant sufficient grounds for relief from the continuing effects of the judgment in event that the circuit court could consider the complaint for declaratory judgment as a motion for writ of error coram nobis?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment V:

> "No person shall be held to answer for * * * infamous crime unless on a * * * indictment of a grand jury * * * nor be deprived of * * * liberty, without due process of law;"

United States Constitution Amendment VI:

> "In all criminal prosecution, the accused shall enjoy the right to * * * trial by * * * jury * * *."

United States Constitution Amendment XIV:

> "1. All persons born * * * in the United States, and subject to the jurisdiction thereof, are citizens of the United States * * *."

Rule 60 (b) Federal Rules of Civil Procedure:

> "* * * and the procedure for obtaining any relief from a judgment shall be by motion * * * or by an independent action."

28 U.S.C.A. 2201:

> "In a case of actual controversy within its jurisdiction * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights * * * of any interested party seeking any such declaration."

STATEMENT OF THE CASE

During the prosecution of Criminal Case No. 171 in the District of North Dakota wherein these appellants were defendants they were denied certain fundamental constitutional rights and did not become aware of said denial until later when certain evidence came to light, whereupon a complaint for declaratory judgment, Civil No. 693, was instituted failing to allege proper jurisdiction. It was dismissed on jurisdictional grounds and no appeal was taken. The instant case was later instituted on other grounds (R. 1, 2, 3, 4, 5, 6, 7, 8, 9) and alleged other material facts and jurisdiction to grant the relief sought under Rule 60 F.R.C.P. This action was likewise dismissed on jurisdictional grounds (R. 11) and a timely appeal was taken to the United States Court of Appeals 8th Circuit (App. A1). The judgment of the lower court was affirmed (App. A4) as to dismissal but not as to the grounds for dismissal (R. 11). The District Court held that it was without jurisdiction to grant the relief sought whereas the Circuit Court held (App. A3)

that a proceeding in district court is proper and that *district courts do have jurisdiction to grant such relief from judgment.*

In addition the Circuit Court for the first time on appeal considered the complaint for declaratory relief as a motion for writ of error coram nobis, reached the merits of the complaint and decided issues of material fact (App. A3, A4) which were not reached by the lower court (R. 11). A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

This case is extremely important in that it will clarify the question of the jurisdiction of the District Court under subsection (b) of Rule 60 F.R.C.P. to declare the rights and citizenship lost through the continuing effect of a judgment alleged to be void because it was obtained through the denial of certain fundamental constitutional rights when the complaint for relief specifically alleges fraud upon the court and the appellants. The District Court recognizes (R. 11) as do the appellants that 28 U.S.C.A. 2201 provides no *new jurisdiction* and is strictly procedural in nature. Our position however is, that 60 (b) provides the jurisdiction to proceed under 2201 as an alternative remedy seems to be borne out in *United States* v. *Morgan*, 346 U.S. 502 at 507, stating: "to move by motion instead of by writ is purely procedural". We of course were *not* moving by 60 (b) motion or *writ*, but rather by independent action which appears to have been held to be proper procedure in *Brownell* v. *Tom We Shung*, 77 S. Ct. 252, a case like the instant case where a declaration of civil rights and citizenship was the relief sought. Moore's Federal Practice, Vol. 6, Sec. 60.02 on Rule 60 states:

> "But 60 (b) states clearly that it does *not* limit the power of the court to *entertain an independent action* * * * *to obtain relief from a judgment; to set aside a judgment for fraud upon the court. . . .*"

Barron & Holtzoff, F. P. & P., Vol. 3, Sec. 1331, on Rule 60 states:

> "The action may be brought without leave of the court *even where the judgment has been affirmed on appeal*".

In view of the foregoing, it would appear that the "late hour" referred to by the Court (App. A4) has no significance.

We now come to the rather important procedural question of whether or not the circuit court could for the first time on appeal, reach the merits of the case (App. A4) when deciding contrary to the affirmative allegations of the complaint as amended and supporting affidavit as to the lack of prior adjudication (R. 1 through 9), that these same matters were now *res judicata* (App. A4). This procedure appears to be contrary to well settled law concerning the function of an appellate court and succinctly stated by The Cyclopedia of Federal Procedure, 3rd Ed., Vol. 13, Sec. 56.53, stating:

> "Although there is no constitutional prohibition against a grant by Congress of original jurisdiction to such courts, *as presently constituted they are courts of review.*" (Emphasis supplied.)

The matter of res judicata and the absence thereof as affirmatively alleged in the complaint (R. 1 through 9) was not reached by the district court and we therefore submit that it was improper procedure on the part of the circuit court to find in any way on the matter. We now come to the "railroad job" that was done on the question of whether

the constitutional rights alleged to have been denied in the complaint (R. 1 through 9) were so fundamental "as to warrant a federal court in wiping out and invalidating * * * the judgment of conviction". (App. A4). One of the several fundamental rights alleged to have been abrogated was the *Fifth Amendment right to Due Process of Law.* This same right was considered sufficiently "fundamental" in *Morgan,* hereinbefore cited. It was sufficiently "fundamental" in *Sanders* v. *U. S.,* 83 S. Ct. 1068, and was held "sufficiently fundamental" in *Shepard* v. *Maxwell,* 86 S. Ct. 1507, and therefore it appears that it should be "sufficiently fundamental" in the instant case.

CONCLUSION

For all the foregoing reasons stated, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

LOREN R. GAJEWSKI AND
MERVIN A. GAJEWSKI
Petitioners pro se

December, 1966

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,410

Loren R. Gajewski and Melvin A. Gajewski, Appellants, v. United States of America, Appellee.	Appeal from the United States District Court for the District of North Dakota.,

[November 14,. 1966.]

Before MATTHES and LAY, Circuit Judges and MEREDITH, District Judge.

PER CURIAM.

This is an appeal from an order of the United States District Court, (a) holding that it lacks authority to grant appellants declaratory judgment relief under 28 U.S.C.A. §2201 (1948), (b) granting the Government's motion for summary judgment, and (c) dismissing the action. The purpose of this proceeding, allegedly brought under §2201, is to obtain a judicial declaration that the judgment of

conviction entered against appellants in *United States* v. *Gajewski,* aff'd., *Gajewski* v. *United States,* 321 F.2d 261 (8th Cir. 1963), *cert. denied,* 375 U.S. 968 (1964) is void and without force or effect.[1]

In a subsequent habeas corpus proceeding, appellants unsuccessfully challenged the validity of their conviction and sentence. See *Gajewski* v. *Stevens, Warden,* 346 F.2d 1000 (8th Cir. 1965).

This is the second time appellants have attacked their conviction since their discharge from the penal institution.[2] On January 25, 1965 they filed their first declaratory judgment action "for the purpose of clearing the record of the farcical indictment and conviction" in the criminal case. As in the instant case, the district court held it lacked jurisdiction to grant summary judgment relief and dismissed the action. No appeal was taken, but on August 3, 1965 this proceeding was instituted. Considering the finality of the prior order, we believe we would be justified in summarily dismissing this appeal. However, inasmuch as appellants have acted pro se throughout this proceeding, we will attempt to demonstrate to them that they are not, on the basis of their complaint, entitled to have the judgment of conviction set aside, regardless of the characterization of the complaint.

A federal prisoner is entitled to collaterally attack the conviction under which he is being detained. 28 U.S.C.A.

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1. Both appellants were convicted by a jury on two counts of conspiracy (a) to defraud the United States by obstructing and attempting to defeat the operation of the Agricultural Adjustment Act of 1938 and (b) to cause false and fraudulent income tax returns to be filed, all in violation of 18 U.S.C. §371. In addition Loren R. Gajewski was convicted of the substantive offense of making false, fraudulent and fictitious statements in his 1959 income tax return, in violation of 18 U.S.C. §1001.

2. Appellants received a total sentence of two years. They were released on parole on December 10, 1964, and fully and finally discharged on February 13, 1966.

§2255 (1948). But we are unaware of any authority which would permit the federal declaratory judgment statute, 28 U.S.C.A. §2201, *supra,* to be used as a post-conviction remedy. We have held that a state prisoner is not entitled to invoke that statute in the federal courts for the purpose of testing the validity of his conviction. *Waldon* v. *Iowa,* 323 F.2d 852 (8th Cir. 1963). The same rule has been applied to federal prisoners. *Coronado* v. *United States,* 341 F.2d 918-19 (5th Cir. 1965); *Clark* v. *Memolo,* 174 F.2d 978, 980-81 (D.C. Cir. 1949).

A convicted party who, like appellants, has served his full sentence is not without a remedy. He may by a proceeding in a federal district court, in the nature of error *coram nobis,* challenge the legality of his conviction and sentence. *United States* v. *Morgan,* 346 U.S. 502 (1954); *Azzone* v. *United States,* 341 F.2d 417-18 (8th Cir. 1965). But error *coram nobis* relief should not be granted except under compelling circumstances. The Supreme Court cautioned in the *Morgan* case, *supra*:

> "Continuation of litigation after final judgment and exhaustion of waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." * * * 346 U.S. at 511.

A close analysis of the reasoning in *Morgan* clearly demonstrates, we feel, that the writ of error *coram nobis* was designed only to correct errors "of the most fundamental character."

Following the teachings of the Supreme Court in *Morgan,* we have treated the record in this case as adequately presenting a motion in the nature of a writ of error *coram nobis.* Careful scrutiny of the complaint leaves us with the firm conviction that a hearing is not required be-

fore the district court. Even if the allegations are true, they are wholly insufficient to warrant a court at this late hour in concluding that the trial in the criminal case and the resulting judgment do not comport with constitutional standards. In brief the charges are made that (a) appellants were denied a fair trial because of their "Christian anti-Communist, anti-Socialist Creed"; (b) that government exhibits were improperly introduced as evidence; (c) that count three of their indictment failed to charge a criminal act; (d) that they were denied a jury trial; (e) that the conspiracy indictment rested upon the commission of a non-criminal act; (f) and finally that United States Attorney acted improperly in certain respects. Most, if not all, of appellants' complaints were raised in the appeal from the judgment of conviction, *Gajewski* v. *United States, supra,* or in the habeas corpus proceeding, *Gajewski* v. *Stevens, Warden, supra,* and were found lacking in substance. In any event the errors relied upon are not so fundamental as to warrant a federal court in wiping out and invalidating the prosecution and the judgment of conviction. Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Judgment)

United States Court of Appeals

For the Eighth Circuit

No. 18,410. September Term, 1966

Loren R. Gajewski and Melvin A. Gajewski, Appellants	Appeal from the United States District Court for the District of North Dakota
vs.	
United States of America	

This cause came on to be heard on the record from the District Court and the briefs filed by the respective parties, and was argued orally.

On Consideration Whereof, It is now here Ordered and Adjudged that the Order of the said District Court in this Cause granting motion of the Government for Summary Judgment and dismissing action be, and the same is hereby, affirmed.

November 14, 1966